88-1043

No. .....

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1988

—o—

WALTER ZANT, WARDEN,

Petitioner,

v.

MICHAEL ALBERT CERVI,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

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QUESTION PRESENTED

Does the acceptance of extradition counsel at a pre-extradition hearing in the asylum state, without more, trigger the Fifth Amendment prophylactic rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), to bar any subsequent initiation of contact by authorities from the demanding state?

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I. AS EXTRADITION IS A SUMMARY EXECUTIVE PROCEEDING, THE CONCLUSION OF THE ELEVENTH CIRCUIT COURT OF APPEALS THAT A FUGITIVE'S ACCEPTANCE OF COUNSEL SOLELY FOR EXTRADITION PROCEEDINGS BARRED INITIATION OF CONTACT BY AUTHORITIES, ESPECIALLY WHERE THERE HAD BEEN NO PRIOR INTERROGATION, DIRECTLY CONFLICTS WITH THIS COURT'S HOLDINGS IN *EDWARDS v. ARIZONA*, 451 U.S. 477 (1981), AND *MICHIGAN v. DORAN*, 439 U.S. 282 (1978). 8

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STATUTES CITED:

28 U.S.C. § 1254(1) 1

The Petitioner, Walter Zant, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on August 26, 1988, and the subsequent denial of the petition for rehearing on September 29, 1988.

———o———

OPINIONS BELOW

The Eleventh Circuit Court of Appeals reversed the denial of habeas corpus relief by the district court, granted relief as to one issue and declined to address other issues in an opinion dated August 26, 1988. *Cervi v. Kemp,* 855 F.2d 702 (11th Cir. 1988). (Appendix C). On September 29, 1988, the Eleventh Circuit Court of Appeals denied the Petitioner's motion for rehearing and suggestion for rehearing *en banc.* (Appendix D).

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JURISDICTION

Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 26, 1988, and rehearing was denied on September 29, 1988. The instant petition for a writ of certiorari has been filed within the allowable ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS

Article 4, Section 2, United States Constitution:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another state, shall on Demand of the Executive Authority of the State from which he fled be delivered up, to be removed to the State having Jurisidction of the Crime.

Fifth Amendment, United States Constitution:

> [N]or shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . .

Sixth Amendment, United States Constitution:

> [A]nd to have the Assistance of Counsel for his defence.

———o———

STATEMENT OF THE CASE

Respondent, Michael Albert Cervi, and Robert Wayne Wilson were indicted by the Taliaferro County, Georgia grand jury during the February Term, 1978 for motor vehicle theft and the armed robbery, kidnapping and murder of Dr. Kenneth Lawrence which occurred on February 27, 1977. Following a separate trial by jury on February 25-29, 1980, Respondent was found guilty on all counts, sentenced to seven years imprisonment for motor vehicle theft and sentenced to death for murder, kidnapping and armed robbery. His convictions and the sentences for murder, kidnapping and motor vehicle theft were affirmed on direct appeal; however, the death sentence for armed

robbery was set aside. *Cervi v. State,* 248 Ga. 325, 282 S.E.2d 629 (1981), *cert. denied,* 456 U.S. 938 (1982).

Respondent filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. Following an evidentiary hearing on September 19, 1983, the state habeas corpus court denied relief in an unpublished opinion on June 7, 1984. On November 9, 1984, the Supreme Court of Georgia granted the application for a certificate of probable cause to appeal. On November 16, 1984, the Supreme Court of Georgia vacated Respondent's death sentence for kidnapping but affirmed the denial of relief in all other respects. *Cervi v. Kemp,* No. 2932 (Ga. Nov. 16, 1984). This Court denied certiorari and the petition for rehearing. *Cervi v. Kemp,* 471 U.S. 1131, *r'hng. denied,* 473 U.S. 921 (1985).

On January 24, 1986, Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Georgia, Augusta Division. On February 17, 1987, the district court entered an order denying the petition except as to two issues upon which the Court ordered a federal evidentiary hearing. An evidentiary hearing was subsequently held on April 24, 1987. Upon conclusion of the federal hearing, the district court made findings of fact and concluded as a matter of law that the two remaining issues were meritless. (Appendix A). A written order denying relief was entered May 20, 1987. (Appendix B).

Respondent subsequently appealed the denial of relief to the United States Court of Appeals for the Eleventh Circuit. Oral argument was had before a panel of the court on April 5, 1988. On August 26, 1988, the Eleventh

Circuit issued an opinion reversing the decision of the district court on the Fifth Amendment issue, which had been one of the two issues upon which the federal evidentiary hearing was held. The Eleventh Circuit found a Fifth Amendment violation and granted relief as to conviction and sentence and declined to address all other issues in the appeal. *Cervi v. Kemp*, 855 F.2d 702 (11th Cir. 1988). Rehearing and rehearing *en banc* were denied on September 29, 1988.

The Petitioner subsequently filed a motion to stay the mandate in the United States Court of Appeals for the Eleventh Circuit to allow sufficient time to file the instant petition. The motion was granted. This petition follows.

—o—

STATEMENT OF FACTS

Respondent and co-indictee Robert Wilson, stationed in Charleston, South Carolina in the United States Navy, went on "unauthorized absence" and were picked up while hitchhiking on Interstate 20 by Dr. Kenneth Lawrence, who was driving a 1976 Ford LTD, South Carolina tag MFJ181. On late Sunday afternoon, February 27, 1977, Dr. Lawrence stumbled out of a wooded area near the Interstate in Taliaferro County, Georgia, and approached a nearby residence. After onlookers called for help, Dr. Lawrence was placed in a car parked at the house. Police arrived and found Dr. Lawrence lying on the car seat, covered with blood from cuts on his neck. A necktie was tied around one wrist. Dr. Lawrence told the sheriff he had been robbed of $1,000.00 and his car and

that he had been tied up and beaten with a rifle. Dr. Lawrence then described Respondent and Wilson as his assailants. A look-out was placed for the two men driving the victim's car.

Dr. Lawrence sustained 3 lacerations in his neck, each ranging from 3 to 7 inches long and a laceration on his head. Dr. Lawrence told his physician that Respondent and Wilson beat him in the head until he was unconscious, then cut his neck. Dr. Lawrence died the next day.

Officers retraced the victim's steps from the wooded area by the track of blood to a small tree in the woods. Blood covered the tree and ground. The tree limbs had been cut off with a knife and the surrounding area was in disarray, indicating a struggle.

Shortly before the victim died, Georgia Bureau of Investigation agent Jonathan Lawrence spoke with the victim at the hospital. Based upon that interview, G.B.I. agents Lawrence and Robert Ingram went to Charleston, South Carolina, seeking information on 2 white males in the military, approximately 18 to 20 years old, one having a surname of Cervi and the other having a first name of Robbie. A Navy commander gave the agents records on Respondent and Wilson, two men who fit the description and who had been absent without leave since February 26, 1977. This information was placed on the National Crime Information Center computer (NCIC) with look-out emphasis on Omaha, Nebraska, and Hayward, California, the hometowns of Respondent and Wilson.

On March 3, 1977, at approximately 9:29 a.m., Iowa state trooper James Brumbaugh stopped a Ford LTD

for speeding on Interstate 79 in southwest Iowa. The car bore South Carolina license tag MFJ181. The subsequent check of the car's tag number and Respondent's social security number through NCIC reflected the car was stolen and Respondent was a murder suspect. The trooper arrested the Respondent and Wilson and transported them to the Mills County jail in Glenwood, Iowa.

The two men were taken before an Iowa magistrate following their arrest. Former Mills County, Iowa, county attorney Walter Green filed "fugitive from justice complaints" against Respondent and Wilson. Both individuals appeared before Magistrate Esther Ingle, who was not an attorney, solely for the purposes of "setting a bond and appointing an attorney for extradition proceedings, if they desired one." Respondent never affirmatively requested counsel but simply replied yes when asked if he wantd an attorney for the extradition proceeding. After the hearing attorney Green called a local attorney who agreed to accept the appointment but was too busy to see his clients that afternoon.

The next morning, prior to the extradition hearing, attorney Green arrived at the courthouse and was informed that Georgia officials had arrived and were interviewing Respondent and Wilson. The district court credited Green's testimony that extradition counsel arrived after the interviews had begun. Attorney Green refused the requests of extradition counsel to stop the interviews as Mr. Green had no indication that Respondent had not wanted to talk to Georgia authorities or wanted to terminate any interview. Prior to the interviews, neither the G.B.I. agents nor Georgia District Attorney Goolsby were told that any local counsel had been appointed for any purpose. Re-

spondent never requested counsel during the interview with G.B.I. agent Ingram, who, along with a second agent and Georgia District Attorney Kenneth Goolsby had flown to Iowa to secure the return of Respondent and Wilson.

In this interview, Respondent told the G.B.I. agent how he and Wilson were given a ride outside Columbia, South Carolina by Dr. Lawrence. While the victim was in a fast-food restaurant buying dinner for the three men, Respondent and Wilson formulated the plan to kidnap and rob Dr. Lawrence. When travel resumed on Interstate 20, Respondent pulled his rifle out of his duffle bag and cocked it and Wilson thereafter took $1,000.00 from the victim's wallet. The two men then forced the victim to exit the interstate and they eventually drove to a wooded area off a side road and parked. Respondent, with his rifle wrapped in a field jacket, walked into the woods with Wilson and the victim, where the two sailors eventually tied Dr. Lawrence to a tree with his necktie and put a handkerchief in his mouth for a gag. Wilson then hit the doctor with Respondent's rifle five or six times, but the doctor was still moving. Wilson told the Respondent that they had to kill the victim and for Respondent to use his knife. Respondent then got down on one knee and stuck his knife in the victim's throat. "I stuck the knife in again and cut with it, pulling the knife toward me. There was blood on me and the knife." The two men then left the area with Dr. Lawrence, still alive, tied to the tree.

The extradition hearing was held on the afternoon of March 4, 1977, after Respondent and Wilson had been brought before another Iowa magistrate who signed an order committing them to the jail or to the custody of the Mills County sheriff for a period not to exceed thirty

days to await extradition. Respondent subsequently waived extradition and was returned to Georgia. After his return to Georgia, a preliminary hearing was held and an indictment later returned.

REASONS FOR GRANTING THE WRIT

I. AS EXTRADITION IS A SUMMARY EXECUTIVE PROCEEDING, THE CONCLUSION OF THE ELEVENTH CIRCUIT COURT OF APPEALS THAT A FUGITIVE'S ACCEPTANCE OF COUNSEL FOR EXTRADITION PROCEEDINGS BARRED ANY INITIATION OF CONTACT BY AUTHORITIES, ESPECIALLY WHERE THERE HAD BEEN NO PRIOR INTERROGATION, DIRECTLY CONFLICTS WITH THIS COURT'S HOLDINGS IN EDWARDS v. ARIZONA, 451 U.S. 477 (1981), AND MICHIGAN v. DORAN, 439 U.S. 282 (1978).

Petitioner submits that this Court should grant the instant petition for a writ of certiorari to assess the holding of the United States Court of Appeals for the Eleventh Circuit in light of the holdings of this Court in *Edwards v. Arizona* and *Michigan v. Doran*. Petitioner submits that not only is this a case of first impression, but the holding of the Eleventh Circuit in this case is in direct contravention of this Court's holdings regarding both extradition and the Fifth Amendment and seriously erodes the policies behind the "bright line" rule of *Edwards*.

This Court has consistently held that extradition is a summary executive proceeding whose purpose is simply

to secure the return of an individual from the asylum state to the demanding state where any criminal proceedings may then commence. *Michigan v. Doran*, 439 U.S. at 289. "The [Extradition] Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial." *Id.* Where an individual contests extradition through filing a petition for a writ of habeas corpus and where the governor has granted extradition, the habeas corpus court may decide only (1) if the extradition documents are proper on their face; (2) whether the petitioner has been charged in the demanding state with a crime; (3) whether the petitioner is in fact the person identified in the extradition request and (4) whether the petitioner is a fugitive from justice. *Id.* Courts of the asylum state cannot examine defenses nor determine guilt or innocence as they have only a "general acquaintance" with the laws and criminal procedure of the demanding state. *California v. Superior Court of California*, — U.S. —, 107 S.Ct. 2433, 2440 (1987); *Pierce v. Creecy*, 210 U.S. 387, 405 (1908). This Court has never held there is a right to counsel in this setting.

The Fifth Amendment protections of *Miranda v. Arizona*, 384 U.S. 436 (1966), provide an accused the right to remain silent and also the right to the presence of an attorney during custodial interrogation. *Edwards*, 451 U.S. at 482. In *Edwards*, the accused asserted his right to counsel during interrogation and this Court held he could not be subjected to "further" interrogation until counsel was made available. *Edwards* at 484-85. The "bright line" rule of *Edwards* is simply a prophylactic rule designed to implement already-existing Fifth Amendment rights. *Solem v. Stumes*, 465 U.S. 638, 647 (1984).

A review of the decision of the circuit court shows that the circuit court totally ignored the summary nature of extradition and the fact that it is not a criminal proceeding to hold that the acceptance of counsel for extradition by Respondent at a pre-extradition hearing in Iowa, the asylum state, constituted a request for counsel under the Fifth Amendment sufficient to trigger the prophylactic rule of *Edwards* to bar police from Georgia, the demanding state, from initiating interrogation of Respondent. This the circuit court held despite the fact that Iowa authorities had not questioned Respondent and the initiation of contact by Georgia authorities was the first attempt at interrogation. In so holding, the circuit court not only impermissibly substituted its judgment based upon a cold record for the credibility findings of the district court judge regardng the live testimony of the Iowa county attorney who was present at all proceedings, but the court below also substituted its factual findings for those of the district court judge (who had denied relief) without finding such facts were clearly erroneous, in direct contravention of *Amadeo v. Zant*, — U.S. —, 108 S.Ct. 1771 (1988), and *Marshall v. Lonberger*, 459 U.S. 1314 (1983). Petitioner urges this Court to grant certiorari to decide this novel question which is not only of importance in this case but in the many factual settings where states seek extradition of fugitives from justice.

As interstate extradition is "a summary and mandatory executive proceeding" and is not a "pre-preliminary" criminal hearing to be conducted on behalf of the demanding state, logic dictates that extradition is not part of the criminal proceedings in the demanding state.

The Sixth Amendment guarantee of counsel for a criminal defendant would not yet attach. *Michigan v. Jackson*, 106 S.Ct. at 1407. Logic would also dictate that until there is custodial interrogation of the person awaiting extradition, the Fifth Amendment privilege against self-incrimination would not be implicated.

Former Mills County Attorney Walter Green testified before the district court that he saw Wilson and Respondent following their arrest by the Iowa trooper. This attorney filed "fugitive from justice complaints" against both men. The two individuals then appeared before an Iowa Magistrate solely for the purposes of "setting a bond and of appointing an attorney for the extradition proceeding, if they desired one." (R2-25, 35). The district court found as fact Respondent never affirmatively requested counsel but simply replied yes when asked if he wanted an attorney for the extradition proceeding which would be held the following day. (Appendix 5, 7, 9).

At the extradition hearing, where Iowa extradition counsel were permitted to make a record of events, County Attorney Green stated that he was contacted at 9:30 or 9:45 a.m. on the morning of the extradition hearing and Mr. Green refused to allow the lawyers to see their clients because they were already talking to Georgia officials. (Trial transcript, p. 1347). Mr. Green testified similarly before the district court, and the court fully credited that testimony, finding, "he [extradition counsel] indeed showed up when the interviews of Mr. Cervi and his co-defendant were going on." (Appendix 6). The circuit court ignored both the factual and credibility findings of the district court judge and impermissibly found that

Georgia authorities knew of Respondent's request for counsel prior to the time Respondent made the confession. (Appendix 19).

The record in this case is unequivocally clear that Respondent, in the interview with GBI Agent Ingram, never asserted his right to the assistance of counsel. The fact that county attorney Green or Georgia prosecutor Goolsby would not interrupt the interview does not constitute misconduct nor render Respondent's waiver of his Fifth Amendment rights in that interview invalid. *Moran v. Burbine*, — U.S. —, 106 S.Ct. 1135 (1986). "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* at 1141.

The district court found "a very definite distinction between the facts that exist in Mr. Cervi's case and . . . that situation where a defendant or suspect in custody, having once agreed to discuss a matter with law enforcement officials, after a proper advisement of his rights, then invokes his right to counsel and terminates the interview." (Appendix 6). The district court not only found that *Edwards* was factually inapplicable, but went on to hold that Respondent was "fully advised" of his rights, that he gave a valid written waiver of those rights and there was "no indication whatsoever that he attempted to discontinue the interview and had there been a score of lawyers who tried to the [sic] get to him the result would not have been different." (Appendix 8).

Here, the facts clearly show that Respondent merely accepted extradition counsel at the pre-extradition hear-

ing. No custodial interrogation of Respondent occurred until Georgia officials arrived the following day and interviewed him, and the record shows that he not only did not invoke his Fifth Amendment protections against self-incrimination and the right to have counsel present in that interview, but validly waived his rights and gave a detailed confession.

Despite the fact that no custodial interrogation of Respondent had occurred until Georgia officials arrived, the court below nevertheless held that the acceptance of extradition counsel barred Georgia authorities from initiating contact with Respondent and, under *Edwards,* rendered his confession involuntary. (Appendix 19-20). The circuit court not only misconstrued *Edwards* but then misapplied *Michigan v. Jackson,* 475 U.S. 675 (1986), to transform the acceptance of extradition counsel into a broad, sweeping request for counsel at any subsequent proceeding. (Appendix 20). Petitioner submits that *Michigan v. Jackson* is inapplicable as it is clear that Respondent's Sixth Amendment right to counsel had not attached when he accepted extradition counsel in Iowa to await return to Georgia for commencement of criminal proceedings. *Michigan v. Jackson,* 106 S.Ct. at 1408-1409. Again, the circuit court simply ignored the nature of extradition proceedings and created a right to counsel that is in effect a hybrid of both the *Edwards* and *Michigan v. Jackson* rules.

The decision of the circuit court not only misconstrues the rule of *Edwards,* but erodes its clarity and facility of application while also limiting techniques police may use to elicit information. In discussing the attachment of the Sixth Amendment right to counsel in *Michigan v. Jack-*

son, this Court noted that once the Sixth Amendment right attached, "police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation." *Michigan*, 106 S.Ct. at 1409. Here, the circuit court has in effect fashioned a "right to counsel" for a fugitive from justice which attaches upon his arrest, barring authorities from interrogating him, for any purpose, if he has fortuitously been granted counsel for extradition. The decision below transforms an extradition proceeding in the asylum state into part of the criminal proceedings in the demanding state. This decision not only pushes the initiation of criminal proceedings to the point of arrest, which directly conflicts with *Michigan v. Jackson*, but creates more constitutional protections for a fugitive from justice than for the accused who has not fled. Not only is the decision below a radical departure from precedent regarding extradition, but it also misconstrues both *Edwards* and *Michigan v. Jackson*, although the circuit court asserted it was not deciding any Sixth Amendment issue.

Because this is a case of first impression and because the factual scenario is not uncommon, Petitioner prays that this Court grant certiorari in order to assess the impact, if any, of the prophylactic rule of *Edwards* upon extradition proceedings.

—o—

CONCLUSION

For all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to review

the decision by the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MICHAEL ALBERT CERVI,	)	
	)	
Petitioner,	)	
	)	FILE NO.
vs.	)	CV186-015
	)	
RALPH KEMP, WARDEN,	)	
	)	
Respondent.	)	

Before:

Honorable DUDLEY H. BOWEN, JR.,
District Judge

at The Federal Courthouse Building, Augusta, Georgia, on the 24th day of April 1987, commencing at the hours of 12:20 p.m.

(p. 52) The Court: One of my objectives in letting counsel know there would be no continuances and to proceed with these type of cases is to dispose of them, in this District Court, as soon as possible.

Consistent with my practice of announcing my findings and conclusions from the bench at the earliest practical time I will do so now in the matter of Michael Cervi against Ralph Kemp. While I do so with the statement that some hours or days of drafting and redrafting might produce a product more grammatical and better researched and certainly more smoothly worded document. I have no doubt that any (p. 53) reviewing authority, particularly the parties present, will understand the reasons for my ruling if done so now and in their presence.

I did by virtue of my order of February 17th, 1987 provide for this evidentiary hearing to consider evidence on these two subject matter areas. I was inclined to agree with counsel for the respondent that the issue relating to the conspiracy charge was one which was dependent more on a legal determination then a factual, but in an abundance of caution I ordered that evidence be adduced to the satisfaction of the petitioner so that the matter could be fully aired.

I'm pleased to have had Mr. Ivey's testimony on the matter. It is always enlightening to understand a case from the point of view of such an accomplished practitioner. I believe I have been fully advised of his understanding and motivations throughout the time that he was fulfilling his duties as counsel to the Mr. Cervi.

I have reviewed this charge that Judge Stevens gave, on several occasions and I'm ready to reemphasize a few areas of it. They are quoted on page 24 of my aforementioned order. In the sentence that begins "if you do not believe beyond a (p. 54) reasonable doubt there was conspiracy or the defendant on trial was not a party to the conspiracy then you would disregard the charge on that subject that the Court is about to give you, but on the other hand if you should find there was a conspiracy and the defendant was part of that conspiracy to do unlawful acts or the acts set forth in the indictment." Then he starts into the charge "when individuals associate themselves in an unlawful act any act done pursuant that association would be the act of each of them." I would underscore there "the act of each of them".

I have flyspecked this charge, so to speak. I have examined it exhaustively and I find it not to be infirmed in any way with respect to some sort of illegal transference of intent or amelioration of the sometimes difficult to prove malice issues.

There were issues in this case, as I see it and I have reviewed this transcript, which might rise a question, in any reasonable jurors mind, about whose actual acts were the cause of death. There would be a danger of confusion, without some clarifications by the court, that a willful and intentional participation in the overall series of (p. 55) events might somehow prevent a murder conviction, if it could not be shown that the Defendant Cervi, actually and personally did the physical acts that indeed resulted in the death. Especially when there was this evidence and questions raised in the trial about the issue of unequal treatment, inadequacy.

There is certainly little surprise in hearing mentioned of some sort of felony murder nexus between Cervi and Wilson that could generally be contended in this case. I think counsel knew there would be some very dedicated attempt on the part of a prosecutor, of Mr. Goolsby's stature, to attach the acts of the codefendant to Mr. Cervi, if he possibly could, whether that be through a more conventional common law type of felony murder vehicle or a more sophisticated latter day conspiracy vehicle.

In any event the court provided Mr. Ivey with this information prior to argument. There was a paucity of information about the discussion that counsel had with the court in the transcript, but it certainly was exposed to counsel prior to argument.

I don't see there was any extraordinary request to reopen the evidence at that time and subsequently the judge did indeed charge the jury, (p. 56) as he had told counsel that he would.

I was concerned about the prospect of any transference or confusion of the intent issue, the intent of Cervi or his codefendant, but in the context of the entire charge given my concerns have been allayed and the evidentiary hearing, while it now appears that it was only marginally necessary it has resolved any doubt that I had in my mind and I am now able to conclude, as a matter of law, aided by the facts that I have already announced, which are largely not in dispute, that the conspiracy charge as given, although it did not charge the jury on the offence of conspiracy, outlined to them the elements of a conspiracy is not for any reason of substance or procedure Constitutionally infirmed.

Turning now to the matter of the confessional statement that was given by Mr. Cervi on March 4th, 1977. I have a copy of that now before me and I am going to have that admitted in our record as Court's Exhibits 1, in this case, simply to relieve anybody else from having to dig through the trial transcript and look at that very small copy of it.

I won't go into the content of the statement itself. The parties here are well aware (p. 57) of what it says. My further review of it would be to no purpose or avail. We are dealing here with a very close examination of the events that took place 10 years and a few weeks ago. There are certainly and admittedly and properly some gaps in memory, as indicated by the testimony of Mr. Cook, Mr. Ingram and Mr. Green. No doubt there are some lapses. I couldn't possibly remember everything that I had done on any day that occurred 10 years ago, even if I were aided by some diary or daily calendar, that is just the state of the human mind. I don't see any immediate prospect of any improvement in that regard. We, however, must do the best we can.

It appears to me, by the facts that I have seen, found in the State Court records and the evidence that has been adduced before me, that I can quite properly find that Mr. Cervi was in custody during the afternoon of March 3rd, 1977. That he was as a matter of course asked by the prosecutor in Iowa if he would like to have a lawyer and responded in the affirmative. Mr. Green states, unequivically, that he called an acquaintance of his, Jim Thomas, who was too busy to see Mr. Cervi and his codefendant at that time, but would do so at his earliest convenience and

within a good bit less (p. 58) than 24 hours Mr. Thomas did show up during the mid morning hours, whether that was 9:30 or 10:30 on March 4th, 1977, at the courthouse. He indeed showed up when the interviews of Mr. Cervi and his codefendant were going on.

Not withstanding his acquaintance and probable friendship with the prosecutor, Walter Green, Mr. Thomas was forceful enough to demand that he be permitted to meet with his prospective clients and that the interview cease. Prosecutor Green declined that demand and stated that the interview would continue unless Thomas offered some better reasoning for its early termination.

When the extradition hearing was conducted, before the State District Judge on the afternoon of March 4th, 1977, this matter was obviously brought into issue, because prosecutor Green was called in to testify about it. A complaint was made about the handling of it by Mr. Thomas, on behalf of Mr. Cervi. At that time the matter was judicially explored. Although I don't think the mere finding of these facts is necessarily dispositive of the issue.

I see here a very definite distinction between the facts that exist in Mr. Cervi's case and (p. 59) the ongoing investigation that was occuring then in Iowa and Georgia on March 3rd and 4th, 1977 and that situation where a defendant or suspect in custody, having once agreed to discuss a matter with law enforcement officials, after a proper advisement of rights, then invokes his right to counsel and terminates the interview.

In such a case as that, an attempted resurrection of the interview by simply another advisement of the sus-

pect's rights by the police would, if permitted, simply have the effect of making the entire Miranda entitlements null and void of any real or practical effect. That is not the case here.

Here we have the situation of a person who had shown the volition, the strength of will to absent himself without leave from the armed forces, to travel across seven or eight state lines, probably more, to get from Taliafferro County to the Nebraska-Iowa border and that person, when asked by a prosecutor if he wanted a lawyer in an extradition proceeding, merely responded in the affirmative. That is not the same degree of element or level of volition or determination that would be exhibited by a suspect who, having once agreed to participate in (p. 60) a custodial interview and who later terminates it and demands the right to counsel.

As far as counsel's demand for the cessation of the interview is concerned I have no doubt that Mr. Thomas felt that he was somehow charged with the responsibility to pursue any right that Cervi and his codefendant or cosuspect may have had at that time, but it also occurs to me, never having met the clients, having only the call of the prosecutor, that no real or genuine relationship of attorney-client had developed between the two of them.

The attorney certainly intended to respond to the call and in my opinion he did so in a timely way, but in the ordinary course of their investigation the investigators were making their interviews, prior to the extradition hearing. They faced a man who had shown the volition and abilities, that I have previously stated. A man who was of an age and intellect that would be appar-

ent in one who was in the service of his nation, in the Navy, which I think I recall, even at that time, was still a volunteer service.

But in any event had the requisite ability to get in the service, even if he did absent (p. 61) himself without leave and was of a greater experience level than would be many of his contemporaries or colleagues, who had not had the benefit of that experience, just by virtue of being in the Navy.

He was fully advised of his rights, which I suspect that he already well knew, both orally and by this statement that he signed in the presence of Mr. Ingram and Mr. Price. The Iowa people had taken a precaution to put a witness in the interview room, so that Mr. Cervi could not be in anyway abused by these police officers that came over to Iowa from down in Georgia. And he proceeded to waive every right that he had and give a full and complete statement. I see no indication whatsoever that he attempted to discontinue the interview and had there been a score of lawyers who tried to the get to him the result would not have been different.

Had he exhibited that degree of volition that enabled him to the change his mind or terminate the interview, after agreeing to give one, after making a known, voluntary, fully advised waiver of his rights, that might require a different result, but here he was well aware of his rights and he waived them, voluntarily and proceeded into the (p. 62) interview and the presence of the attorney, as far as I can tell, was entirely and totally unknown to him. As between him and the police it was as if it did not happen.

The question here is not whether someone else chose to waive his rights or assert his rights. The question is whether Cervi made a voluntary and knowing waiver of his rights and I find unequivically that he did.

His mere assent to the prospect of representation for the extradition hearing, on the preceeding afternoon, cannot in anyway detract from the strength of his waiver, that he made at the beginning of the custodial statement.

Accordingly it is my finding of fact and conclusion of law that the statement of Mr. Cervi was indeed admissible. It was not obtained by means of coersion or any other inappropriate means and after an evidentiary hearing on that subject matter area I find his conviction not to be in anyway Constitutionally infirmed because of its admission. Consequently I will enter a brief order, early next week, with reference to the finding and conclusion, given at the bench today, denying the writ and that will conclude the matter.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

MICHAEL A. CERVI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CIVIL ACTION
	)	CV186-015
RALPH KEMP, Warden, Georgia Diagnostic and Classification Center,	)	
	)	
Respondent.	)	

ORDER

An evidentiary hearing in the captioned case was held on April 23, 1987, in Augusta, Georgia. For the reasons fully set forth in the record of those proceedings, petitioner is DENIED habeas corpus relief.

ORDER ENTERED at Augusta, Georgia, this 20th day of May, 1987.

/s/ Dudley G. Bowen, Jr.,
UNITED STATES DISTRICT JUDGE

APPENDIX C

Michael Albert CERVI,
Petitioner-Appellant,

v.

Ralph KEMP, Warden, Georgia
Diagnostic and Classification
Center, Respondent-Appellee.

No. 87-8449.

United States Court of Appeals,
Eleventh Circuit.

Aug. 26, 1988.

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

ANDERSON, Circuit Judge:

Petitioner Michael Cervi appeals the denial of his petition for a writ of habeas corpus. Because Cervi's confession was obtained in violation of the rule of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 878 (1981), we reverse the judgment of the district court and remand with instructions that the district court grant the writ.

I. FACTS

The facts relevant to our decision are as follows. On the morning of March 3, 1977, Iowa State Trooper James Brumbaugh stopped a car for speeding in Mills County, Iowa. Cervi was driving the car, and his travelling companion, Robbie Wilson, was in the back seat. Upon learning that Cervi and Wilson were wanted for murder in

Georgia, Brumbaugh arrested Cervi and Wilson and transported them to the Mills County Jail in Glenwood, Iowa.

During the afternoon of March 3, Cervi was brought before Iowa magistrate Esther Engle. When Magistrate Engle asked whether Cervi wanted counsel, Cervi answered yes. The proceedings were then adjourned until counsel could be obtained. Shortly thereafter, the Iowa prosecutor, Walter Green, contacted a local attorney, James Thomas, concerning the matter. Thomas agreed to represent Cervi, but he told Green that he could not see Cervi until the next morning. Magistrate Engle then appointed Thomas to represent both Cervi and Wilson.[1]

At some time before 9:30 the next morning, Georgia district attorney Kenneth Goolsby and Georgia Bureau of Investigation agent Robert Ingram arrived at the Mills

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1. Although the record does not contain a form on which Magistrate Engle appointed Thomas, the record indicates that she did appoint him on the afternoon of March 3. At the extradition hearing held on March 4 before a different judge, Iowa prosecutor Green stated:

> Each of the gentlemen, both Mr. Cervi and Mr. Wilson, at the time of the hearing before Magistrate Engle [on March 3] were asked if they wished to have an attorney for the proceedings. Each said they wished—each responded "yes," they did. A few moments after the request was made, after each of the young men were brought before Magistrate Engle, separately, Mr. James A. Thomas was called on the telephone by Magistrate Engle—by myself; I'm sorry—and *Magistrate Engle then and there did appoint Mr. James A. Thomas to represent the two of them,* and since that time the matter was continued until 10:00 o'clock this morning. . . .

Transcript of March 4, 1977 Extradition Hearing at 3-4 (emphasis added). (We cite to the original transcriber's pagination which varies by one page from the pagination assigned by the state trial court.)

County Sheriff's Office. At their request, Cervi was brought to the sheriff's office from the jail, a separate building a short distance away. At 9:30, Ingram, accompanied by Iowa Bureau of Criminal Investigation agent Gary Price, took Cervi to a private room near the sheriff's office, Ingram read Cervi a standard *Miranda*[2] form and obtained his signature on it. Ingram then summarized the evidence against Cervi, and Cervi confessed orally to the crime.[3] At 10:06, Ingram began writing out Cervi's confession, and Cervi signed it at 10:56.

Meanwhile, Cervi's attorney, James Thomas, had arrived at the courthouse. At 9:15, Thomas began seeking access to his clients. He made two requests to the Mills County Sheriff, Merle Brown. Sheriff Brown told Thomas that he would have to wait. At 9:30, Thomas stepped into a nearby office where Iowa prosecutor Green and Georgia prosecutor Goolsby were conferring. Thomas insisted that

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2. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

3. Agent Ingram testified as follows at the federal evidentiary hearing:

> I met Mr. Cervi at approximately 9:30 that morning[;] we talked for approximately 30 minutes. After which he orally provided me with an admission to the crime, [sic] I then ask[ed] him if he would have any objection to my reducing what he told me to writing. He stated that he did not. At 10:06 a.m. I began a written statement that concluded at 10:56. So, it was about an hour and a half oral and written interview.

Transcript of April 24, 1987 Federal Evidentiary Hearing at 29.

he be allowed to see his clients, but the prosecutors refused his request.[4] After conferring with another lawyer by

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4. At the extradition hearing held on March 4, Thomas created a record of the morning's events. Thomas called Iowa prosecutor Green as a defense witness and questioned him as follows:

> [THOMAS] Mr. Green, is it a fact that you contacted myself to represent both Robert Wayne Wilson and Mr. Michael Albert Cervi yesterday afternoon, Thursday, March 3rd at approximately 4:15 p.m.?
>
> [GREEN] The time I couldn't be sure of, but I know the hearing was after 3:45. That's when the complaint was filed. So about 4:00 o'clock or 4:15 sounds about right. I did call you and did tell you—did ask you if you would represent Cervi and Wilson and you responded you would.
>
> [THOMAS] And, Mr. Green, is it not the fact that I told you I have discussed [would discuss?] the merits of the controversy with the defendants on Friday morning, March 4, 1977, with some restrictions as to place and manner? Is that correct?
>
> [GREEN] Yes. You told me that you had other appointments even [sic] yesterday evening and you would get together with them tomorrow morning which would be this morning, and before the hearing.
>
> [THOMAS] And is it not a fact that I attempted to contact the defendants this morning, Friday, at 9:30 a.m. and was refused permission by yourself to interview or talk with either of the defendants? Is that correct?
>
> [GREEN] That's right, at 9:30.
>
> [THOMAS] Is it also a fact that you told me at that time that the defendants were being interviewed by agents of the Bureau of Criminal Investigation for the State of Georgia, and that I insisted that I had a right to be present at the time of that interview?
>
> [GREEN] You told me that.
>
> [THOMAS] And is it a fact that you again refused me permission to talk with or advise or counsel with either of these defendants at that time?
>
> [GREEN]That's right.

Transcript of March 4, 1977 Extradition Hearing at 29-30.

telephone, Thomas again demanded that the prosecutors allow him to see his clients at 9:45, but the prosecutors continued to deny him access. Cervi was never advised of the presence of Thomas.

Later that morning, an extradition hearing was held, and the events surrounding the confession were put on record, including Thomas' repeated requests for access to his clients. Cervi then waived extradition, and Goolsby and Ingram brought him back to Georgia. Cervi was tried and convicted of murder, kidnapping, armed robbery, and motor vehicle theft. During the trial, the state introduced, over defense objections, Cervi's written confession as well as Ingram's testimony as to his oral confession.[5] The jury sentenced Cervi to death on the murder, kidnapping and armed robbery counts.[6]

II. PROCEDURAL HISTORY

On September 29, 1981, the Georgia Supreme Court affirmed Cervi's conviction, but it vacated his death sentence on the armed robbery count, leaving intact the death sentences on the murder count and the kidnapping count. *Cervi v. State*, 248 Ga. 325, 282 S.E.2d 629 (1981). The United States Supreme Court denied Cervi's petition for certiorari on April 19, 1982. *Cervi v. Georgia*, 456 U.S. 938, 102 S.Ct. 1995, 72 L.Ed.2d 457 (1982).

Cervi next sought a state writ of habeas corpus in the Superior Court of Butts County, Georgia. That court

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5. Trial Transcript, vol. 4 at 901-02, 920-25.

6. The judge also sentenced Cervi to seven years on the motor vehicle theft charge.

held an evidentiary hearing on September 19, 1983, and it denied all relief in an unpublished order dated June 7, 1984. The Georgia Supreme Court vacated Cervi's death sentence on the kidnapping count, but it affirmed the denial of relief in all other respects in an unpublished order dated November 16, 1984. Thus, the death sentence on the murder count remained in effect. The United States Supreme Court denied certiorari on May 28, 1985. *Cervi v. Kemp*, 471 U.S. 1131, 105 S.Ct. 2666, 88 L.Ed.2d 282 (1985). The Supreme Court denied rehearing on July 1, 1985. *Cervi v. Kemp*, 478 U.S. 921, 105 S.Ct. 3548, 87 L.Ed.2d 671 (1985).

On January 24, 1986, Cervi filed a petition for federal habeas relief in the Southern District of Georgia.[7] On

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7. Cervi raised twenty issues in his petition for relief in the district court: (1) that his confession was improperly admitted; (2) that his motion for change of venue was improperly denied; (3) that the exclusion from the jury of venirepersons who expressed complete opposition to the death penalty improperly prevented blacks from serving on the jury; (4) that venirepersons who expressed partial opposition to the death penalty were improperly struck from the jury; (5) that his opportunity to cross-examine certain witnesses was improperly limited; (6) that hearsay evidence was improperly admitted; (7) that he was denied the right to present a defense; (8) that the jury was improperly instructed on causation; (9) that the jury was improperly instructed on lesser-included offenses; (10) that the jury was improperly instructed on malice and intent; (11) that the jury was improperly instructed on conspiracy; (12) that his presentation of evidence at the penalty phase was improperly limited; (13) that during the penalty phase the prosecutor improperly commented on Cervi's assertion of his Fifth Amendment rights; (14) that the prosecutor made an improper closing argument during the penalty phase; (15) that the jury was improperly instructed on aggravating circumstances; (16) that the jury was not given sufficient guidance concerning the application of O.C.G.A.

(Continued on following page)

February 17, 1987, the district court denied relief on all but two grounds (the confession issue and the conspiracy charge issue) and ordered an evidentiary hearing as to those two grounds. The court held the evidentiary hearing on April 24, 1987. At the conclusion of the hearing, the court announced its intention to deny relief on the two remaining grounds, and it issued an order to that effect on May 20, 1987. On June 18, 1987, the court granted Cervi's application for a certificate of probable cause to appeal, and this appeal followed.[8]

(Continued from previous page)

§ 17-10-30(b)(7); (17) that appellate review of his case was inadequate; (18) that the Georgia death penalty was arbitrarily applied; (19) that the Georgia death penalty was discriminatorily applied; and (20) that the definition of certain aggravating circumstances was vague and overbroad.

8. On appeal, Cervi raised seven issues: (1) that his confession was improperly admitted (Issue 1 in footnote 3); (2) that the jury was improperly instructed on lesser-included offenses (Issue 9 in footnote 3); (3) that the jury was improperly instructed on malice and intent (Issue 10 in footnote 3); (4) that the jury was improperly instructed on conspiracy (Issue 11 in footnote 3); (5) that his presentation of evidence at the penalty phase was improperly limited (Issue 12 in footnote 3); (6) that during the penalty phase the prosecutor improperly commented on Cervi's assertion of his Fifth Amendment rights (Issue 13 in footnote 3); and (7) that the prosecutor made an improper closing argument during the penalty phase (Issue 14 in footnote 3).

Because our disposition of the confession issue requires a new trial, we need not address the other issues raised on appeal. Though we do not reach these issues at this point, they are not abandoned. We also note that Cervi attacks the admission of his confession on both Fifth and Sixth Amendment grounds. Because of our decision on the Fifth Amendment issue, we do not reach the Sixth Amendment issue, but we note that it is not abandoned. The other issues raised in the district court (i.e., Issues 2-8 and 15-20 in footnote 3) were not raised on appeal, and we deem them abandoned.

III. DISCUSSION

Cervi claims that the Georgia authorities illegally obtained his confession by initiating custodial interrogation after he had requested counsel in violation of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).[9] *Edwards* held that an accused in custody "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85, 101 S.Ct. at 1885. The Supreme Court has consistently reaffirmed the bright-line rule of *Edwards*. *Arizona v. Roberson*, — U.S. —, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988); *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985); *Smith v. Illinois*, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984); *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983); *Wyrick v. Fields*, 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982). *See also Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) (applying a similar bright-line rule in the Sixth Amendment context).

Under these facts, the *Edwards* violation is clear. Cervi unequivocally invoked his right to counsel at the initial proceeding before the magistrate. He was in uninterrupted custody from that time until after he gave his in-

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9. *Edwards* applies to this case because this case was pending on direct appeal when *Edwards* was decided. *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985).

criminating statement. He did not in any way initiate the conversation that led to the statement. The Georgia authorities knew of Cervi's request for counsel prior to the time that he made his confession.[10]

The district court held that Cervi's execution of a *Miranda* waiver form prior to beginning his confession constituted a waiver of his previous assertion of his right to counsel. Transcript of April 24, 1987 Federal Evidentiary Hearing at 56-62. This holding is contrary to *Edwards*. In *Edwards*, the court held "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-

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10. It is undisputed that Georgia prosecutor Goolsby was present when defense attorney Thomas made his 9:30 request for access to Cervi and that Goolsby joined with Iowa prosecutor Green in denying access. Although it is unclear whether GBI agent Ingram knew of Cervi's request, we have no trouble in imputing Goolsby's knowledge to Ingram when Goolsby was just a few steps away and could have stopped the interview. *See Arizona v. Roberson*, — U.S. —, 108 S.Ct. 2093, 2101, 100 L.Ed.2d 704 (1988) ("Finally, we attach no significance to the fact that the officer who conducted the second interrogation did not know that respondent had made a request for counsel. . . . *Edwards* focuses on the state of mind of the suspect and not the police. . . . The [interrogator's] failure to honor [the request for counsel] cannot be justified by the lack of diligence of a particular officer." (footnote and citation omitted)). *Cf. Michigan v. Jackson*, 106 S.Ct. at 1410 (imputing knowledge of request for counsel from one state actor to another in a Sixth Amendment context). Moreover, Ingram did not begin his interview with Cervi until 9:30, and he spent considerable time reading Cervi his *Miranda* rights and summarizing the evidence. *See* footnote 3, *supra*, and accompanying text. Thus, Goolsby clearly knew of Cervi's request before Cervi began to confess. For these reasons, we need not address the question of whether the Iowa authorities were agents of the Georgia authorities.

initiated custodial interrogation *even if he has been advised of his rights.*" 451 U.S. at 484, 101 S.Ct. at 1884 (emphasis added and footnote omitted). *See also Solem*, 465 U.S. at 646, 104 S.Ct. at 1343 ("*Edwards* established a new test for when [the waiver of right to counsel during custodial interrogation] would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication."). Because Cervi did not initiate the conversation which led to his confession, he did not waive his right to have an attorney present during that interrogation by signing the *Miranda* form.

The state argues that Cervi's request for counsel did not trigger the protections of *Edwards* because it was not made during custodial interrogation. In other words, the state argues that Cervi's request for counsel at the hearing before Magistrate Engle was a request for counsel for formal legal proceedings and was not a request for counsel during custodial interrogation by police. We reject the state's argument. *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) clearly requires us to give Cervi's request a broad interpretation:

> Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel—we presume that the defendant requests the lawyer's services at every critical stage of the prosecution. We thus reject the State's suggestion that respondents' request for the appointment of counsel [at arraignment] should be construed to apply only to representation in formal legal proceedings.

Id. 106 S.Ct. at 1409 (footnotes omitted).[11] Since Cervi in no way limited his request, it must be construed to extend to custodial interrogation. *Cf. Connecticut v. Barrett*, 479 U.S. 523, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987) (defendant may, by his own language, limit his request for counsel to certain settings).

IV. CONCLUSION

The state obtained Cervi's confession in violation of his Fifth Amendment rights as set forth in *Edwards*. The

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11. The holding in *Michigan v. Jackson* quoted in the text was a secondary holding in the case. The primary holding was the application in the Sixth Amendment context of *Edwards'* bright-line rule. After lengthy discussion, *Fleming v. Kemp*, 837 F.2d 940 (11th Cir.1988), applied *Michigan v. Jackson's* bright-line rule retroactively to the penalty phase of a case pending on collateral attack at the time *Michigan v. Jackson* was decided. *Michigan v. Jackson's* secondary holding—i.e., the application of *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), waiver principles quoted in the text above—was also applied retroactively without discussion in *Fleming*, 837 F.2d at 947, and also in *Owen v. Alabama*, 849 F.2d 536, 538-39 (11th Cir.1988). Indeed, the Supreme Court in *Michigan v. Jackson* characterized its application of *Johnson v. Zerbst* waiver principles as the "settled approach." 106 S.Ct. at 1409.

Therefore, we believe *Jackson* undermines this circuit's decisions in *Collins v. Francis*, 728 F.2d 1322 (11th Cir.), *cert. denied*, 469 U.S. 963, 105 S.Ct. 361, 83 L.Ed. 297 (1984) and *Blasingame v. Estelle*, 604 F.2d 893 (5th Cir.1979). Both *Collins* and *Blasingame* held that a request for counsel at an arraignment is not a request for counsel for purposes of subsequent police-initiated interrogation. We note that at least one circuit has already indicated that *Jackson* undermines *Collins* and *Blasingame*. *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 123-24 n. 5 (7th Cir.), *cert. denied*, — U.S. —, 107 S.Ct. 3240, 97 L.Ed.2d 745 (1987). *See also Boles v. Foltz*, 816 F.2d 1132, 1137-41 (6th Cir.), (Gibson, J., dissenting), *cert. denied*, — U.S. —, 108 S.Ct. 167, 98 L.Ed.2d 121 (1987); *Wilson v. Murray*, 806 F.2d 1232 (4th Cir.1986), *cert. denied*, — U.S. —, 108 S.Ct. 197, 98 L.Ed.2d 149 (1987).

admission of the tainted coonfession requires a new trial.[12] For the foregoing reasons, the judgment of the district courts is REVERSED and REMANDED with instructions to grant the writ conditioned upon the state's affording Cervi a new trial within a reasonable time.

REVERSED and REMANDED.

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12. The state has not argued that the admission of Cervi's confession was harmless error.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-8449

MICHAEL ALBERT CERVI,

Petitioner-Appellant,

versus

RALPH KEMP, Warden, Georgia Diagnostic and Classification Center,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion August 26, 1988, 11 Cir., 198—, — F.2d —).

(SEP 29 1988)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

EDITOR'S NOTE

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No. 88-1043

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,

-v-

MICHAEL ALBERT CERVI,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, MICHAEL ALBERT CERVI, , by and through his undersigned counsel, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of fees and costs, and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A."

Respectfully submitted,

JAMES M. DOYLE
124-121 Warren
Roxbury, Massachusetts 02119
(617) 445-5640

ATTORNEY(S) FOR PETITIONER

No. 88-1043

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,

-v-

MICHAEL ALBERT CERVI,

Respondent.

AFFIDAVIT OF POVERTY

I, MICHAEL ALBERT CERVI, declare that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor, and that I believe that I am entitled to relief.

1. Are you employed? Yes _____ No X

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____

   b. If the answer is "no," state the date of last employment, and the amount of salary and wages per month which you received. U.S. Navy $400.00 Month 1977 Feb.

2. Have you received within the last twelve months any money from the following sources?

   a. Business, profession or form of self-employment? Yes___ No✓
   b. Rent payments, interest, or dividends? Yes___ No✓
   c. Pensions, annuities, or life insurance payments? Yes___ No✓
   d. Gifts or inheritances? Yes✓ No___
   e. Any other sources? Yes___ No✓

3. Do you own any cash, or do you have any money in any checking or savings account?

Yes X No _____ (Include any funds in prison account)
If the answer is "yes," state the total value of the items owned. $56.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes _____ No ✓

If the answer is "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute to their support. None

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

MICHAEL ALBERT CERVI

Sworn to and subscribed before me,

this the 19th day of January, 1989.

Harriet P. Morris
Notary Public

My Commission expires:

Notary Public, Fulton County, Georgia
My Commission Expires May 30, 1990

CERTIFICATE

I hereby certify that Petitioner, MICHAEL ALBERT CERVI, EF-125872, has the sum of $ 56.00 on account to his credit at the Georgia Diagnostic and Classification Center where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said Georgia Diagnostic and Classification Center.

None to my knowledge

June S. Rollingsworth

Authorized Officer of Institution

No. 88-1043

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WALTER ZANT, WARDEN

Petitioner

V.

MICHAEL ALBERT CERVI,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES M. DOYLE
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Respondent

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Counsel for Respondent

January 20, 1989

QUESTION PRESENTED

When a prisoner in uninterrupted custody unambiguously and without qualification requests counsel and obtains the appointment of counsel, may the authorities initiate an interrogation and elicit a confession while physically barring counsel from meeting his client?

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No. 88-1013

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WALTER ZANT, WARDEN,

Petitioner,

V.

MICHAEL ALBERT CERVI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF FACTS

A more reliable and more cogent statement of facts than that contained in the Petition is provided in the opinion of the Court of Appeals, Cervi v. Kemp, 855 F.2d 702 (11th Cir. 1988), from which the following account is drawn.

On the morning of March 3, 1977, Iowa State Trooper James Brumbaugh stopped a car for speeding in Mills County, Iowa. Cervi was driving the car, his companion, Wilson, (who received a life sentence and did not appeal), was in the back seat. The Trooper learned that Cervi and Wilson were wanted for murder in Georgia, arrested them and brought them to the Mills County Jail. During the afternoon of March 3, Cervi was brought before

an Iowa magistrate. When the magistrate asked whether Cervi wanted counsel, Cervi answered yes. The proceedings were adjourned until counsel could be obtained. Shortly thereafter, the Iowa prosecutor contacted a local defense attorney who was then appointed by the magistrate. The matter was adjourned until the following morning.

At some time before 9:30 the next morning Georgia authorities arrived at the Mills County Sheriff's Office. At their request, Cervi was brought to the sheriff's office from the jail, a seperate building, a short distance away. At 9:30, the Georgia Bureau of Investigation official took Cervi to a private room, near the sheriff's office. Cervi was read his Miranda rights, and for a period of "approximately 30 minutes" given a summary of the evidence against him by the agent. At 10:06 the agent began to transcribe Cervi's confession, which Cervi signed at 10:56.

During this time, beginning at 9:15, Cervi's appointed counsel was trying to reach his client. He made two requests to the Mills County Sheriff. At 9:30, counsel made similar requests to the Iowa and Georgia District Attorneys, which he repeated at 9:45. The prosecutors persisted in their refusal to interrupt the police interrogation.

Within the hour, an extradition hearing was held, and the events surrounding the confession were put on the record, including

defense counsel's repeated requests for access to his client. Cervi then waived extradition, returned to Georgia, was tried, convicted, and sentenced to death.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS APPLIED THE WELL-SETTLED RULE OF EDWARDS V. ARIZONA TO UNDISPUTED FACTS.

When Petitioner asks that this Court grant certiorari to consider "the application if any, of the prophylactic rule of Edwards upon extradition proceedings", (Petition, at 14) he demonstrates a fundamental misunderstanding of the Edwards rule itself and of its straightforward application to this case by the Court of Appeals.

Edwards does not require the pendency of any particular sort of proceeding. In fact, the Edwards rule is concerned with the consequences of custody itself, not, as Petitioner seems to believe, with those of "the initiation of criminal proceedings." (Petition at 14) The petition is written as though this were a case in which a suspect not in custody was afforded special rights because of the pendency of an extradition hearing. Since the facts of this case are otherwise, however, the petition's approach is unfair to the Court of Appeals. Mr. Cervi received no specially extended protections by virtue of a pending extradition hearing; the Court of Appeals simply recognized that he was entitled to the protections afforded every suspect in custody.

Those protections are succinctly set out in Edwards and have been reaffirmed at every oppurtunity: an accused in custody, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police." Edwards v. Arizona, 451 U.S. 477, 484-485 (1981). See also, Arizona v. Roberson, ___U.S.___, 108 S.Ct. 2093 (1988); Shea v. Louisiana, 470 U.S. 51 (1985); Smith v. Illinois, 469 U.S. 91 (1984); Solem v. Stumes, 465 U.S. 638 (1984). The unanimous panel of the Eleventh Circuit (indeed, the unanimous Eleventh Circuit, no judge having requested even a poll concerning rehearing, Pet. Appendix D), merely stated the obvious by holding that "Under these facts, the Edwards violation is clear." Pet.App. at 9. A brief review of the facts will indicate how clear.

First, it is undisputed that Cervi was in custody between the time of his arrest and the time of his confession. This custody entitled him to the protections outlined in Edwards. Second, it is also clear, as the Court of Appeals held, that Cervi "unequivocally" requested counsel and that an Iowa magistrate appointed counsel and recessed the proceedings to permit Cervi to consult his appointed lawyer. Pet.App. at 18-19. Third, Cervi

did nothing which could be construed as an initiation of the conversations with the authorities.

Finally, the authorities willfully barred Cervi's appointed counsel from advising his client before the confession occurred and without notifying Cervi of counsel's presence. When the Petition refers to the fact that the "interview" had already begun when counsel was first barred it attempts to elide the fact that the confession was not elicited until the interview had been underway according to the interrogating officer, for "[A]pproximately thirty minutes." In other words, the Petition obscures the fact that Cervi's lawyer was intentionally prevented from advising him before the confession was made. Pet.App. at 13.

The Petition betrays a pervasive confusion concerning the quite different purposes of the Sixth Amendment's right to counsel, which arises only after the commencement of proceedings and the Fifth Amendment's right to counsel, which exists whenever a suspect in custody requests a lawyer's help. The Court of Appeals, in writing its opinion, clearly did not share the Petitioner's confusion. Indeed, the Court of Appeals noted, (Pet.App. at 17, footnote 8), that Cervi had raised a Sixth Amendment challenge to his confession which need not be resolved because the Fifth Amendment violation was so clear. It may be worth noting, moreover, that were the Sixth

Amendment issue before the Court it would be a difficult one. Unlike Moran v. Burbine, 475 U.S. 412 (1986), which Petitioner cites, this is a case in which a suspect personally requested counsel, where judicial officer had acted on that request and when the authorities knew of his request when (before his confession) they embargoed his counsel. Evaluation of the conduct of the authorities in this case would require reaching the questions which Moran reserved, on a record which strongly argues that Mr. Cervi's fundamental rights were violated.

Someday this Court may be faced with a case which requires consideration of what right to counsel a non-custodial suspect possesses when facing an extradition hearing. In all likelihood, when the question must be faced it will be a complicated one. Typically, a suspect facing an extradition proceeding will be facing potential charges in both the demanding state (e.g., the murder in the case) and in the asylum state (e.g., weapons violations, possession of stolen property, traffic charges in this case). As the unanimous Court of Appeals found, however, this case does not require resolution of these problems; it simply requires a straightforward application of a well-settled and extremely valuable bright-line rule which consistently and efficiently guides the conduct of criminal justice professionals.

CONCLUSION

This Court should therefore refuse to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, which simply applied well-settled principles previously deided by this Court, and which presents no substantial question for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing opposition was mailed, postage prepaid, to Paula K. Smith, Esq., 132 State Judicial Building, 40 Capitol Square, Atlanta, Georgia, 30334, this 20th day of January, 1989.

James M. Doyle